BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MATT M. RYAN Claimant	)	
V.	)	
O'REILLY AUTOMOTIVE, INC. Respondent	)	Docket No. 1,076,830
AND	)	
SAFETY NATIONAL CASUALTY CORP. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 26, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Michael Stang of Overland Park, Kansas, appeared for claimant. J. Scott Gordon of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to prove by a preponderance of the evidence he sustained an injury arising out of and in the course of his employment with respondent, or that he provided notice within the required 20 days.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 25, 2016, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the preponderance of credible evidence proves he was injured in the course of his employment and that he provided timely notice of the same. Claimant contends the earliest medical records corroborate his testimony.

Respondent maintains the ALJ's Order should be affirmed.

The issues for the Board's review are:

1. Did claimant sustain an injury arising out of and in the course of his employment?

2. Did claimant provide timely notice of his work injury?

FINDINGS OF FACT

Claimant worked for respondent for approximately two months as an assistant manager. Claimant testified that on May 7, 2015, while reaching for a part on a shelf, he brushed against an aluminum radiator and cut his leg. Claimant explained the radiator was stored openly on the floor, and he straddled it to reach the shelf. Claimant testified the radiator cut through his jeans and into his right ankle, causing him to bleed into his sock. He did not bandage the wound. Claimant worked his full shift on May 7, 2015.

Claimant stated he told his manager, Daniel Bare, Jr., about the incident later that day but did not request medical treatment at that time. Claimant testified Mr. Bare printed out an accident report form, which claimant completed either the day of the incident or the following day. Claimant stated both he and Mr. Bare signed the form. Mr. Bare denied claimant's testimony, stating claimant never reported an accident to him. Mr. Bare denied providing or signing an accident report for claimant, stating he could lose his job if he failed to report an accident. Mr. Bare also contradicted claimant, testifying the radiators are kept in boxes, not out in the open.

Claimant went to Overland Park Regional Medical Center (OPRMC) on his own on May 19, 2015. Prior to seeking treatment, claimant stated his ankle was discussed at work. Claimant testified a co-worker, Michael Eubanks, "always asked [him] how [his] leg was doing."[1] Claimant indicated he told everyone about the incident with the radiator when asked about his leg. Claimant stated Mr. Eubanks suggested he seek treatment for his leg. Claimant testified Mr. Bare sent him to the hospital, stating:

> Q. Okay. So on May 19th you go to Overland Park Regional. Did you ask for authorization to go to the hospital?
>
> A. Yes. [Mr. Bare] sent me. He said, "You need to go have that looked at."
>
> . . .
>
> Q. I want to make sure this is clear. Did you tell him that you were going to the hospital because of the cut on your leg from the radiator?
>
> A. Yes.
>
> Q. Did you tell anybody else, Mike Eubanks, did Mike take a look at your leg by the way?

[1] P.H. Trans. at 40.

A. Yeah. He was there that day that I got in there.

Q. Mike saw your leg. Did Mike suggest you go to the hospital?

A. I believe he said, "I think you need to have it looked at," yes.

. . .

Q. Did you tell him, Mike, you were telling Mike this is from the radiator cut?

A. Yes. He suggested it looked like a, he suggested it looked like a spider bite.[2]

Mr. Eubanks testified claimant mentioned a burning sensation on his ankle on or about May 19, 2015. Mr. Eubanks has degrees in biology, chemistry, and secondary education. He indicated he used to teach about venomous spiders, and he asked claimant to show him the affected area. Mr. Eubanks testified:

> I saw a silver dollar, the traditional silver dollar sized red blemish that looked as if it was growing outward. And at the very inside, very center, there was about a millimeter of gray tissue which would have suggested that that tissue was dead or that was the point of injury.[3]

At that time, Mr. Eubanks suggested claimant go immediately to the hospital. He testified claimant never mentioned a work-related incident. Mr. Eubanks testified he overheard Mr. Bare ask claimant if his ankle condition was work-related, and claimant said it was not.

Mr. Bare testified he remembered claimant complaining about his right ankle, but he was told by claimant it was a spider bite. Mr. Bare agreed he was aware claimant was going to the hospital on May 19, 2015, but denied sending claimant for treatment of a work injury.

The OPRMC records from May 19, 2015, noted claimant's complaint:

> 3 days, right ankle infection. Pt. thought was from spider bite, (but then realizes it's in same spot where cut ankle, with piece of aluminum, while working at O'Reillys auto).[4]

---

[2] *Id*. at 40-41.

[3] *Id*. at 104.

[4] *Id*., Cl. Ex. 1 at 2.

Claimant denied telling anyone his wound was from a spider bite. Claimant was treated with antibiotics at OPRMC and released that same day. Claimant continued working full-duty at respondent.

Claimant returned to OPRMC on June 15, 2015. It was noted claimant's symptoms had initially improved, but later returned when his antibiotic treatment ended. Claimant was provided additional antibiotics. Claimant again sought treatment at OPRMC on September 10, 2015. He was diagnosed with a chronic ulcer of the right lower extremity and provided medication.

Claimant testified he approached Mr. Bare regarding authorized medical treatment, but Mr. Bare told him respondent was neither at fault nor responsible for claimant's leg wound. Mr. Bare disputed claimant's testimony, indicating the conversation never occurred. Mr. Bare stated he asked claimant on more than one occasion whether he injured himself at work:

> And then, again, when [claimant] went [to the hospital] the second time I said, "Are you sure you did not do this at work?" He says, "Dan, I didn't do this at work. More than likely I did it at my detail shop."[5]

Claimant testified he operated his own detailing company, cleaning cars. He also indicated on respondent's employment application that he performs repairs on his personal vehicle and those of his friends and family. Claimant was not a mechanic for respondent. Respondent does not perform vehicle repair aside from battery and windshield wiper replacement.

Claimant's employment was terminated in August 2015. Mr. Bare testified claimant accepted a competitor's items as a return and subsequently lied about it, ending in his termination. Claimant agreed he was terminated but stated the items in question belonged to respondent. Claimant testified he attempted on numerous occasions to contact Mr. Bare regarding his wound following his termination. Mr. Bare testified at no time did claimant attempt to contact him.

Claimant eventually resumed treatment, on his own, with Dr. John Hiebert on November 5, 2015. Dr. Hiebert recorded:

> [Claimant's] wound apparently was initiated in May of this year when he was employed as a mechanic at [respondent]. This was in May 2015. While working on an automobile apparently part of a heated radiator popped off, striking him in the left lower leg, and he had a piece of metallic material that transmitted into his skin and soft tissues. He apparently got the attention of his supervising individual while at [respondent] and was treated initially at Shawnee Mission Medical Center,

[5] P.H. Trans. at 69-70.

> according to his report. Apparently he underwent surgical removal of the foreign body and was placed on some type of antibiotic.[6]

Claimant testified Dr. Hiebert's history was incorrect aside from the incident occurring in May 2015 as the result of a radiator. He denied providing that history to Dr. Hiebert and could not say where the doctor obtained those details. Claimant initially testified he could not recall whether a foreign body was removed from his ankle before agreeing Dr. Hiebert's record was inaccurate. Mr. Eubanks testified claimant mentioned having a metal fragment removed from his ankle in June 2015, but never indicated the fragment was a result of a work-related injury.

Dr. Hiebert noted claimant's injury was "obviously a workman's comp injury, which initially was not treated comprehensively."[7] Dr. Hiebert recommended claimant receive wound care, including a debridement with ultrasound and grafting.[8] Claimant has treated with Dr. Hiebert on a near weekly basis since November 2015. Claimant explained Dr. Hiebert cleaned and treated his wound in addition to providing medication. Claimant has not undergone the recommended debridement.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2015 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2015 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury

---

[6] *Id*., Cl. Ex. 2 at 25.

[7] *Id*. at 15.

[8] See *id*. at 8.

> may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

The ALJ's conclusion that claimant failed to prove his ankle injury arose out of and in the course of his employment was based largely on the issue of credibility. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.[11] Appellate tribunals are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor.[12]

The undersigned understands claimant's assertion that Mr. Bare and Mr. Eubanks might be hesitant to testify against the interests of their employer. However, the evidence contradicting claimant's testimony is also found in the medical records.

The recorded history contained in the OPRMC records raises suspicion regarding claimant's allegations of a work-related injury. The history suggests the alleged work relationship of the injury was an afterthought. The medical center's history is consistent with Mr. Eubanks' testimony that both he and claimant looked at the lesion on claimant's ankle and agreed it looked like a spider bite.[13] The undersigned also finds the history taken by Dr. Hiebert is inconsistent with claimant's testimony.

The undersigned agrees with the ALJ that this is a difficult case to decide. Had the evidence consisted only of the testimony of claimant and respondent's witnesses, the ALJ could have made a credibility judgment in favor of claimant. However, when the medical

---

[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2015 Supp. 44-555c(j).

[11] See *Garner v. Kitselman Construction, LLC,* No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

[12] See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103, 869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[13] See P.H. Trans. at 91.

evidence is included, the weight of the evidence suggests claimant's injury occurred sometime other than during his work for respondent.

CONCLUSION

Based upon the evidence contained in the record the undersigned finds claimant failed to prove he suffered an injury arising out of and in the course of his employment with respondent. The notice issue is moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated May 26, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Michael Stang, Attorney for Claimant
mikes@kcworkcomp.com
lynn@kcworkcomp.com

J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
sgordon@mgbp-law.com
vfuller@mgbp-law.com

Hon. Kenneth J. Hursh, Administrative Law Judge